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No. 91-1422

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

S. PAUL HOBBS, and DONNA M. HOBBS, his wife and PHILLIP RAY HOBBS, and DOROTHY V. HOBBS, his wife,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF *AMICUS CURIAE* OF THE AMERICAN FARM BUREAU FEDERATION IN SUPPORT OF PETITIONER

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BRIEF *AMICUS CURIAE* OF THE AMERICAN FARM BUREAU FEDERATION IN SUPPORT OF PETITIONER

With the written consent of all parties given and filed with the Clerk of the Court, the American Farm Bureau Federation respectfully submits this brief as *amicus curiae.*

Amicus curiae, the American Farm Bureau Federation, prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

INTEREST OF *AMICUS CURIAE*

The American Farm Bureau Federation (AFBF) is a voluntary general farm organization formed in 1919 and organized in 1920 under the General Not-For-Profit Corporation Act of the State of Illinois. AFBF has its principal offices in Park Ridge, Illinois. AFBF was founded to protect, promote, and represent the business, economic, social, and educational interests of American farmers and ranchers. AFBF has member organizations in 50 states and Puerto Rico, representing more than 3.8 million member families. AFBF farm and ranch members produce virtually every kind of agricultural commodity produced commercially in the United States.

The preservation of private property rights and the ability to farm are of paramount importance to American farmers and ranchers. Farmers and ranchers are inceasingly becoming subject to restrictive regulations at the local, state, and national levels that impair their ability to farm, and, in some instances, eliminate that ability altogether. The protection of "wetlands" is today one of the most serious threats to private property rights and agricultural production.

The American Farm Bureau and its farm and ranch member families have a vital interest in the outcome of this case. The Court of Appeals has stretched the reach of the Clean Water Act from "waters of the United States" to virtually "all lands of the United States." What was conceived as an anti-water pollution statute has been stretched into a national "land-use zoning act." Private property owners, especially farmers and ranchers who own the bulk of the "wetlands" in this country, are in desperate need for this Court's clarification of what are jurisdictional "adjacent wetlands," and to answer the question of the authority of the federal government to regulate "non-adjacent wetlands."

STATEMENT OF THE CASE

The case is as stated by the Petitioner.

REASONS FOR GRANTING THE WRIT

I. THE ENVIRONMENTAL PROTECTION AGENCY DOES NOT HAVE INDEPENDENT AUTHORITY TO MAINTAIN AN ENFORCEMENT ACTION WHERE THE CORPS OF ENGINEERS HAS DETERMINED THERE IS NO REQUIREMENT FOR A SECTION 404 PERMIT

The Court of Appeals erred in determining that the Environmental Protection Agency (EPA) has independent authority under the Clean Water Act, 33 U.S.C. §§ 1251 *et seq.* (CWA) to maintain an enforcement action for violation of CWA Section 404 where the Corps of Engineers (Corps), the designated permitting authority under Section 404, has determined there to be no Section 404 jurisdictional waters ("wetlands") and that no Section 404 permit is required.

The Corps has the exclusive authority to determine jurisdiction and the requirement of a permit under Section 404. 33 U.S.C. § 1344(a). The EPA's regulations acknowledge such exclusive Corps' authority. 40 C.F.R. § 230.3(n). The EPA's role in the Section 404 permit program is the development of guidelines in conjunction with the Corps for Corps permit determinations, 33 U.S.C. § 1344(b), and "veto" authority over Corps' decisions to issue a Section 404 permit that have specified impacts, none of which are present in this case. 33 U.S.C. § 1344(c).

The EPA and the Corps resolved the issue of which agency would be responsible for determining "wetlands" jurisdiction. See, *Memorandum of Agreement Between the Department of the Army and the Environmental Protection Agency Concerning the Determination of Geographic Jurisdiction of the Section 404 Program and the*

Application of the Exemptions Under Section 404(f) of the Clean Water Act, dated January 19, 1989 (MOA). The MOA makes it clear that the Corps will routinely make original "wetlands" determinations without prior consultation with the EPA, and that Corps determinations in such routine cases will be final and not overruled by the EPA. These provisions of the MOA are consistent with the EPA's actions in *Golden Gate Audubon Society, Inc. v. U.S. Army Corps of Engineers*, 700 F. Supp. 1549, (N.D. Cal. 1988), where EPA withdrew an independently issued violation Findings and Order when it found out that the Corps had previously disclaimed jurisdiction.

A Corps jurisdictional decision not to require a Section 404 permit is discretionary and only subject to review pursuant to the citizen's suit provisions of the CWA, 33 U.S.C. § 1365, and the Administrative Procedures Act, 5 U.S.C. §§ 551 *et seq.* And, in such cases where the Corps' decision has been deemed deficient, the Court's jurisdiction is limited to remand to the Corps for a proper determination. See, *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 902 n.11 (5th Cir. 1983). Similarly, the EPA's CWA authority in cases where it disagrees with a Corps determination disclaiming jurisdiction is to administratively remand such determination to the Corps for a proper determination. EPA cannot, and in practice has not, independently proceed with an enforcement action when it disagrees with a Corps determination of no jurisdictional "wetlands" and thus no requirement for a Section 404 permit.

The Circuit Court's decision creates two separate regulatory authorities with separate enforcement powers under the Section 404 program, resulting in confusion and uncertainty as to compliance with the law. This Court needs to resolve this dilemma.

II. THE COURT OF APPEALS HAS ALLOWED THE UNWARRANTED EXPANSION OF JURISDICTIONAL "WETLANDS" TO INCLUDE MILLIONS OF ACRES OF PROPERTY WHICH ARE NOT "BORDERING" OR "CONTIGUOUS" TO ANY "WATERS OF THE UNITED STATES"

This Court, in *U.S. v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985), has thus far determined only "navigable" and "adjacent wetlands" to be jurisdictional "wetlands" under the CWA. By way of a footnote, this Court left open the question of jurisdiction over "wetlands" that are "not adjacent to bodies of open waters." 474 U.S. at 132 n.8. As a result of this open jurisdictional question, the Court of Appeals has allowed the unwarranted expansion of jurisdictional "wetlands" to include millions of acres of private property which are neither "bordering" nor "contiguous" to any "water of the United States," but merely "neighboring" or "in reasonable proximity."

In this case, the Court of Appeals even condoned the District Court permitting a jury of laymen to make a determination of what constitutes a jurisdictional "wetland," allowing them to use three different technical delineation manuals developed for decision making by skilled regulators and which did not even exist until long after the claimed "wetland" violations occurred. Other Circuits have held that the District Court is without power to substitute its own "wetland" determination for that of the agency because of the expertise required to make such a determination. *Avoyelles*, 715 F.2d at 906.

America's farmers and ranchers are in critical need of this Court's clarification of what are jurisdictional "adjacent wetlands," and to draw the line somewhere on the reach of the CWA to "non-adjacent wetlands."

CONCLUSION

For the reasons outlined above, certiorari should be granted and the judgment below reversed.

Respectfully submitted,

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